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Attorneys for Plaintiff
KYLE WISHNER

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

KYLE WISHNER, an individual,
Plaintiff,
vs.

WELLS FARGO BANK, NA and
DOES 1 through 10, inclusive,
Defendant.

Case #: 2:16-cv-02832

*Assigned to Hon. Judge
Michael W. Fitzgerald*

JOINT RULE 26(f) REPORT

DATE: August 1, 2016
TIME: 11:00 a.m.
DEPT.: 1600

The parties hereby submit to the Court our Joint Rule 26(f) Report:

A. Statement of the Case:

- i. Plaintiff's case: Wells Fargo made over 100 telephone calls to Plaintiff's cell phone, after being told he could not afford to pay a debt and to stop calling, in violation of the California Fair Debt Collection Practices Act, the Telephone Consumer Protection Act, and related common law.
- ii. It is the pattern and practice, and the business plan of Defendant to place repeated and continuous telephone calls to

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consumers in an abusive and intrusive manner, which conduct has the natural consequence to annoy, oppress, harass and abuse. See *Wolfe v. Wells Fargo*, 14-cv-00472-JCS (April 7, 2014), *Italiano v. Wells Fargo*, 13-cv-01323 (June 7, 2013); *Babida v. Wells Fargo Bank, N.A.*, Case# 110-CV-184728 (Santa Clara Superior Court 2010), *Vierra v. Wells Fargo*, 112-cv-226437 (Santa Clara Superior Court 2012); *Wyatt v. Wells Fargo*, Case# 110-CV-175840 (Santa Clara Superior Court 2010); *Walker v. Wells Fargo*, Case# 111-CV-203386 (Santa Clara Superior Court 2011).

iii. Defendant's case: Defendant denies Plaintiff's allegations and denies any liability to Plaintiff in this case. Defendant contends that Plaintiff's claims are barred by the class action settlement in *Franklin v. Wells Fargo Bank, N.A.*, No. 3:14-cv-02349-MMA-BSG, filed October 3, 2014 (S.D. Cal.). Apart from Plaintiff's claims being barred by *Franklin*, Defendant contends Plaintiff provided consent to be called. Defendant also denies it violated the TCPA, RFDCPA, any related common law or any other law. Defendant also denies it violated Plaintiff's privacy or was negligent in any way.

B. Subject Matter Jurisdiction: For the Telephone Consumer Protection Act claim, jurisdiction of this Court arises under 28 U.S.C. § 1331. See, *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 742 (2012). Supplemental jurisdiction exists for the state law claims of the Rosenthal Fair Debt Collection Practices Act, Invasion of Privacy – Intrusion on Seclusion, Negligent Infliction of Emotional Distress, and Negligent Training and Supervision pursuant to 28 U.S.C. § 1367.

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1 Since Defendants conduct business within the State of California,
 2 personal jurisdiction is established in this Court. Venue is proper
 3 pursuant to 28 U.S.C. 1391.

5 Defendant asserts that this matter is subject to binding arbitration per
 6 the arbitration clause in Plaintiff's credit card agreement.

7 **C. Legal Issues:**

- 8 • Plaintiff's Statement of Legal Issues:
- 9 ○ (1) Whether or not the Defendant violated the TCPA?
- 10 ○ The issues involved in a TCPA violation are:
- 11 ■ Whether Plaintiff was called on his cell phone by Defendant
- 12 using an automated dialer?
- 13 ■ Whether Defendant left a voice mail for Plaintiff using an
- 14 artificial voice?
- 15 ■ Whether Defendant had prior consent to call the Plaintiff on
- 16 his cell phone?
- 17 ■ If Defendant had prior consent, whether Plaintiff revoked that
- 18 consent?
- 19 ○ (2) Whether or not the Defendant violated the FDCPA?
- 20 ○ The issues involved in a FDCPA violation are:
- 21 ■ Whether Plaintiff is a consumer?
- 22 ■ Whether the debt at issue was used for personal, family, or
- 23 household purposes?
- 24 ■ Whether Defendant extends consumer credit in the normal
- 25 course of its business?
- 26 ■ Whether Defendant violated any portion of the FDCPA when
- 27 it called Plaintiff over 100 times when he asked them to
- 28 stop?

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- Whether Defendant acted in a conscious disregard of Plaintiff's rights.

- Defendant's Statement of Legal Issues:

- The Parties are in dispute over the alleged violations of the TCPA 47 U.S.C. § 227, the RFDCPA, CAL. CIV. CODE § 1788, invasion of privacy, negligent infliction of emotional distress, and negligent supervision by Defendant, Wells Fargo Bank, N.A., which Plaintiff contends stem from the collection practices that Defendant engaged in while attempting to collect consumer debt. Additionally, the Parties dispute whether Plaintiff is entitled to any damages. The legal issue in this matter include:

- Whether Defendant called Plaintiff using an automated telephone dialing system;
- The total number of calls "made" within the meaning of the TCPA;
- Whether Plaintiff gave consent to be called by Wells Fargo;
- Whether Plaintiff ever revoked consent to be called;
- Whether the alleged calls to Plaintiff were harassing;
- Whether Defendant made any misleading statements in an attempt to collect a debt;
- Whether Defendant had impermissible communications with third parties;
- Whether Defendant's actions intruded on Plaintiff's private affairs and whether those intrusions were offensive;
- Whether Defendant failed to exercise ordinary care in attempting to collect a debt from Plaintiff;
- Whether Defendant was negligent in training its employees;

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- Whether Plaintiff suffered any damages;
- Whether this action belongs in arbitration; and
- Whether Plaintiff's claims are barred by the class action settlement in *Franklin v. Wells Fargo Bank, N.A.*, No. 3:14-cv-02349-MMA-BSG, filed October 3, 2014 (S.D. Cal.).

D. Parties, Evidence, etc.:

A list of parties, percipient witnesses and key documents on the main issues in the case. For conflict purposes, corporate parties must identify all subsidiaries, parents and affiliates.

Parties

Kyle Wishner

Wells Fargo Bank, N.A.

Additional Statement by Plaintiff:

Defendant's Debt Collectors (Defendant has yet to provide last names, addresses and phone number as required by Fed. R. Civ. P. 26):

Glenda

Priscilla

Brenda

Bonnie

Lisa Ann

Brad

Dawn

Amber

Devon

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1 *Other consumers, former employees, harassed by Defendant:*

2 Marilyn Walker, San Jose, CA

3 Theresa Babida, San Jose, CA

5 Judy Vierra, Morgan Hill, CA

6 Charles Ryan Italiano, San Diego, CA

7 Jessie and Dawn Wolfe, Brentwood, CA

8 Sharon Wyatt, San Jose, CA

9 Additional Statement by Defendant

10 Wells Fargo denies that it harassed any of the aforementioned
11 persons or that their claims are relevant in any way to Plaintiff's
12 claims, or that their purported testimony is in any way relevant or
13 admissible in this matter. Additionally, Wells Fargo believes that
14 Plaintiff's inclusion of these persons in this report is inappropriate.

15
16 **E. Damages:**

17 Plaintiff's Statement:

18 Under the TCPA, Plaintiff is entitled to \$500 per phone call for
19 negligent violations of the law, and treble damages if Plaintiff can
20 prove willfulness. Plaintiff believes it can prove willfulness. If all other
21 elements are proven, Plaintiff need only prove the number of calls
22 made, and multiply the number of calls by either \$500 or \$1,500.

23
24 Under the California Rosenthal Fair Debt Collection Practices Act,
25 Plaintiff is entitled to up to \$1,000 plus actual damages. Actual
26 damages is also at issue in the other common law claims. Cases
27 similar to this one where actual damages were awarded provided
28 recovers in the following amounts:

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Actual damages (i.e. emotional distress, anxiety, etc.) and punitive damages are difficult to quantify and will be determined by a jury. A jury awarded a husband and wife \$100,000 in actual damages (emotional distress), and \$400,000 in punitive damages, caused by a debt collector's violations of the FDCPA and related claims. *Fausto v. Credigy et al.*, 07-05658 JW (Docket# 408, April 3, 2009). A San Jose judge awarded a consumer \$50,000 for actual damages/emotional distress caused by a debt collector's violation of the FDCPA and related claims. *Panahiasal v. CreditCare*, 2007 U.S. Dist. LEXIS 17269 (N.D. Cal. 2007).

Defendant's Statement:

Defendant denies that Plaintiff has been damaged in any amount. Defendant seeks an award of the costs of this action and reasonable attorney's fees pursuant to Cal. Civ. Code §§ 1788.17 (15 U.S.C. § 1692k(a)(3)) and Cal. Civ. Code § 1788.30(c)).

F. Insurance: No insurance.

G. Motions: Further discovery could lead to amendments. The deadline for amendments will be January 31, 2017. Additionally, Defendant intends to file a motion to compel arbitration if Plaintiff will not consent to arbitrate this matter. Defendant will also file a motion to enforce the *Franklin* class action settlement, if necessary.

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1 H. Manual for Complex Litigation: No part of the procedures of the
2 Manual for Complex Litigation should be utilized.

3 I. Status of Discovery: Plaintiff has provided his Rule 26(f) initial
4 disclosures, and intends to serve written discovery and notice
5 depositions imminently.
6 Defendant will serve its initial disclosures by July 25, 2016.
7

8
9 J. Discovery Plan: Plaintiff will serve written discovery and notice
10 depositions next week. Defendant contends that discovery is
11 premature, as this matter is subject to arbitration.
12

13 Plaintiff's Statement:

14 Plaintiff requests an Order for Defendant to produce the following
15 documents and information, which has been ordered other federal
16 courts in California at the Rule 26(f) scheduling conference:
17

- 18 i. Collection logs/account notes and auto-dialer logs.¹
- 19 ii. Phone bills and telephone records relating to calls place to
20 Plaintiff.²
- 21 iii. Collections and auto-dialer procedure manuals,³

22
23 ¹ *Wells v. GC Services, L.P.*, Case Management Conference Order, 06-03511 RMW,
24 Docket #13, (N.D. Cal. 2006); *Jachetta v. Capio Partners, LLC*, 12-CV-3410 LHK,
25 Docket #18 (N.D. Cal. 2012); and *De La Torre v. Legal Recovery Law Office*, 12-CV-
26 02579 LAB WMC (S.D. Cal. December 17, 2013); *Pacheco v. WebBank*, 13-05964
BLF (N.D. Cal. June 19, 2013)

27 ² *Id.*

28 ³ *Wells v. GC Services Ltd.*, Docket #13, 06-03511 RMW (N.D. Cal. September 20,
2006); *De La Torre v. Legal Recovery Law Office*, 12-CV-02579 LAB WMC (S.D. Cal.
December 17, 2013)

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iv. Identify the name, city and state of Defendant's corporate representative (Fed. R. Civ. P. 30(b)(6)).⁴

Defendant's Statement:

Defendant objects to Plaintiff's request for an "order for Defendant to produce documents" outside of the discovery process. Defendant believes discovery on the following subjects will be appropriate:

- The number of calls at issue and the purpose of any such calls;
- Any actions taken or statements made by Plaintiffs in conjunction with such calls or any other communications between Plaintiff and Defendant regarding his credit card;
- The extent those communications constitute consent and/or revocation; and
- Plaintiff's alleged damages, if any.
- Defendant reserves the right to conduct discovery on any other issues related to the subject-matter of this action, as needed.

In an effort to reduce costs and fees Plaintiff proposes that depositions be conducted by remote video or phone. *Guillen v. Bank of America, Corp.*, 2011 U.S. Dist. LEXIS 97966 (N.D. Cal. August 31, 2011). Defendant agrees to confer with Plaintiff about this request in the context of specific depositions once any are set.

K. Discovery Cut-off: May 31, 2017

L. Expert Discovery: June 30, 2017

M. Dispositive Motions: Issues that Plaintiff believes may be determined by motion for summary judgment or motion *in limine* are as follows: None at this time. Defendant reserves its right to file a motion for summary judgment.

N. Settlement/Alternative Dispute Resolution (ADR): Upon receipt of the standard essential discovery courts routinely order debt collectors to

⁴ *Jachetta v. Capio Partners*, Docket# 18, 12-03140 LHK (N.D. Cal. October 3, 2012).

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1 produce at Rule 26(f) conferences Plaintiff will be in better position to
2 make a settlement demand, and would like to attend mediation.

3 O. Trial Estimate:

5 i. Plaintiff: Plaintiff believes that it will call approximately 7-12
6 witnesses. Plaintiff requests a jury trial of 5-7 days, and will be
7 prepared to discuss in detail the estimate.

8 ii. Defendant: Defendant estimates it will call 2-3 witnesses.
9 Defendant requests a jury trial of 3-5 days.

10 P. Trial Counsel:

11 i. Plaintiff: Andre L. Verdun, Esq.

12 ii. Defendant: Mark D. Lonergan, Esq. and Courtney C. Wenrick,
13 Esq.

14 Q. Independent Expert or Master: The parties do not believe it is
15 necessary to appoint a master pursuant to Rule 53 or an independent
16 scientific expert.

17 R. Timetable: See EXHIBIT A, attached.

18 S. Other issues: None at this time.

19
20
21 Dated: **July 18, 2016**

22 /s/ Andre L. Verdun _____
23 Andre Verdun,
24 Attorneys for Plaintiff
25 KYLE WISHNER
26
27
28

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